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Supreme Court, U.S.
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No. 98-1425

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1998

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Luis Bonilla, *et al*,
*Petitioners,*

v.

Volvo Car Corporation and
Trebol Motors Corporation *et al.*,
*Respondents.*

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Brief *Amicus Curiae* Of
Hon. José Fuentes Agostini,
Attorney General Of
The Commonwealth Of Puerto Rico,
In Support Of Petitioners

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## QUESTION PRESENTED

Whether the judgment of the First Circuit – which fails to account for this Court's decision in *Salinas v. United States* (522 US 52 (1997)) – should be vacated and remanded for further consideration in light of *Salinas*?

## TABLE OF CONTENTS

QUESTION PRESENTED ..... i
TABLE OF CONTENTS ..... ii
TABLE OF AUTHORITIES ..... iii
BRIEF *AMICUS CURIAE* ..... 1
INTEREST OF THE *AMICUS CURIAE* ..... 1
SUMMARY OF THE ARGUMENT ..... 3
ARGUMENT ..... 4
I. Petitioners' Alleged, And The Jury Found, That Volvo Engaged In A Conspiracy To Defraud In Violation Of 18 U.S.C. § 1962(d). ..... 4
II. The Court Of Appeals Erred In Its Analysis Of Petitioners' RICO Conspiracy Claim. ..... 7
CONCLUSION ..... 13

## TABLE OF AUTHORITIES

### CASES

*Aetna Cas. Sur. Co. v. P & B Autobody*, 43 F.3d 1546 (1st Cir. 1994) ..... 11

*Ahmed v. Rosenblatt*, 118 F.3d 886 (1st Cir. 1997), *cert. denied*, 118 S. Ct. 1165 (1998) ..... 9

*Beck v. Prupis*, 162 F.3d 1090 (11th Cir. 1998), *petition for cert. pending on separate question*, No. 98-1480 ..... 13

*Fortney v. Kuipers*, No. 98 C 5387, 1999 U.S. Dist. LEXIS 2273 (N.D. Ill. Feb. 19, 1999) ..... 13

*Goren v. New Vision Int'l*, 156 F.3d 721 (7th Cir. 1998) ..... 12

*Kaplan v. Reed*, 28 F. Supp.2d 1191 (D. Colo. 1998) ..... 12

*Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc.*, 7 F. Supp.2d 277 (S.D.N.Y. 1998) ..... 13

*Pelfresne v. Village of Rosemont*, 22 F. Supp.2d 756 (N.D. Ill. 1998) ..... 13

*Sadighi v. Daghighfekr*, C/A No. 2:98-2648-18, 1999 U.S. Dist. LEXIS 346 (D.S.C. Jan. 15, 1999) ..... 12

*Salinas v. United States*, 522 U.S. 52 (1997) ..... passim

*Schmidt v. Fleet Bank*, 16 F. Supp.2d 340 (S.D.N.Y. 1999) ..... 13

*United States v. Posada-Rios*, 158 F.3d 832 (5th Cir. 1998) , *cert. denied*, 1999 U.S. LEXIS 2102 (Mar. 22, 1999) ..... 12

### STATUTES

18 U.S.C. § 1962(c)) ..... passim

18 U.S.C. § 1962(d) ..... passim

**OTHER AUTHORITIES**

Petitioners' RICO Case Statement ..... 5
Petitioners' Third Amended Complaint ..... 5

**RULES**

S. Ct. R. 37.4 ..... 1

## BRIEF *AMICUS CURIAE*

Pursuant to Supreme Court Rule 37.4, José Fuentes Agostini, Attorney General of the Commonwealth of Puerto Rico, respectfully submits this brief *amicus curiae* in support of Petitioners.

## INTEREST OF THE *AMICUS CURIAE*

*Amicus* Attorney General is the principal law enforcement officer of the Commonwealth of Puerto Rico and also is the Commonwealth's principal legal representative. The Attorney General's responsibilities thus encompass not only enforcement of the criminal laws but also protection of the civil interests of the citizenry and of the government itself. In both roles, *amicus* has a considerable interest in the issues raised by the Petition for Certiorari.

Among the areas of concern most vital to *amicus*' duties are practices within his jurisdiction that raise substantial claims of commercial and consumer fraud, particularly when the government of Puerto Rico itself may have been victimized. In discharging his duties, the Attorney General not only investigates and prosecutes allegations of corporate wrongdoing and deceptive practices that fall within his jurisdiction, but also takes the steps necessary to recover damages in favor of the government and Puerto Rican citizens who are the victims of such practices. Such *parens patriae* actions further the law enforcement goal of deterring unfair practices that injure consumers. Such actions also are crucial to recovering damages – in both money and goods – that provide the consumers of Puerto Rico fair compensation for statutory violations.

The Attorney General appears as *amicus* in a very limited number of civil actions that directly implicate his duties to the citizens and government of Puerto Rico. This is such a case. Petitioners alleged and proved at trial that Respondents, including Volvo Car Corporation ("Volvo"), engaged in a conspiracy to defraud consumers in Puerto Rico in violation

of the federal Racketeer Influenced and Corrupt Organizations Act ("RICO"). Pet. App. 2a. Petitioners specifically encompass a certified class of "approximately *9,000* Puerto Rican consumers who purchased Volvo vehicles of the 200 series from [Respondents] during a ten year period." Pet. App. 1a (emphasis added). According to the jury's verdict, these Puerto Rican consumers incurred actual damages in excess of $43,000,000, which the district court subsequently trebled as required by the RICO statute. This civil judgment was among the largest in the Commonwealth's history. Other civil actions, which make related allegations against Respondents, currently are pending in Puerto Rico and await this Court's decision on this Petition. It therefore is the Attorney General's understanding that the First Circuit's failure to analyze properly the RICO conspiracy claims presented by this case will deprive Petitioners and others similarly situated of the appropriate recovery under the RICO statute.

*Amicus* also has a public interest in this case based on three further aspects of the First Circuit's decision. First, the court of appeals' ruling may undermine the efficacy of the RICO conspiracy provision (18 U.S.C. § 1962(d)), which has emerged as an important self-help tool for consumer protection. In particular, as *amicus* discusses below, it is the Attorney General's view that the First Circuit's opinion fails to account for the distinction between Petitioners' allegations of a substantive RICO violation (*see* 18 U.S.C. § 1962(c)) and a RICO conspiracy (*see id.* § 1962(d)). The decision below therefore deprives the RICO conspiracy provision of the independent force intended by this Court's decision in *Salinas v. United States* (522 U.S. 52 (1997)).

Second, the ruling below has the potential to undermine *amicus*' efforts to combat price fraud, both as a criminal matter and through enforcement of the antitrust laws. Petitioners allege that they paid grossly excessive prices for Volvo cars as a result of the Respondents' deceptive practices. The court of appeals ruled, despite the absence of supporting testimony in the record, that the excessive prices charged in

this case did *not* constitute evidence of a fraudulent scheme, but instead merely reflected the operation of Puerto Rico's island economy. Pet. App. 45a-46a. Unless the case is remanded for further consideration, the court of appeals' conclusion may be invoked by defendants in other civil suits and in antitrust enforcement brought actions by *amicus* to defeat well-founded allegations of price fraud and price fixing.

Third, *amicus* is responsible for pursuing the Commonwealth's effort to recoup tens of millions of dollars in excise taxes lost when the Respondents provided the government false information regarding Volvo vehicles. That effort is endangered by the ruling below, which can be read to erroneously insulate Volvo's conduct from liability notwithstanding Petitioners' evidence of Volvo's knowing participation in the conspiracy.

## SUMMARY OF THE ARGUMENT

Petitioners in this case alleged and proved that Respondents violated, and conspired to violate, the federal RICO statute. The evidence at trial specifically established the knowing participation of Respondent Volvo in the RICO conspiracy. The First Circuit subsequently reversed the judgment against Volvo in its entirety, but in so doing addressed only the substantive RICO count, not the conspiracy judgment. Volvo contends otherwise in its brief in opposition ("BIO"), but cannot identify any discussion of the conspiracy count in the analysis section of the court of appeals' opinion. In particular, Volvo cannot provide any citation for its claim (made five separate times in the brief in opposition) that the First Circuit held that Volvo did not "knowingly participate" in the conspiracy. Instead, Respondent conflates the First Circuit's holding that Volvo did not knowingly participate *in individual RICO predicate acts* with a broader holding, not suggested by the opinion below, that Volvo did not know knowingly participate *in the conspiracy*.

The decision below accordingly can only be understood to conflict with this Court's intervening decision in *Salinas v. United States* (522 U.S. 52 (1997)). *Salinas* held that a RICO conspirator need only "adopt the goal of furthering or facilitating the criminal endeavor" (118 S. Ct. at 477), an inquiry that the First Circuit failed to undertake. *Salinas* also rejected the First Circuit's long-standing precedent in holding that a RICO conspirator need not commit or agree to commit the RICO predicate acts that make up a violation of 18 U.S.C. § 1962(c). *Id.* at 487. Therefore, to the extent that the First Circuit equated Volvo's liability under Section 1962(d) with its liability under Section 1962(c), the court of appeals' holding conflicts with *Salinas*. Accordingly, the judgment should be vacated and the case remanded for further consideration in light of *Salinas*.

## ARGUMENT

### I. Petitioners' Alleged, And The Jury Found, That Volvo Engaged In A Conspiracy To Defraud In Violation Of 18 U.S.C. § 1962(d).

a. Petitioners' allegations and proof at trial are summarized in the Petition (at 5-10), as well as in the opinion of the district court (Pet. App. 4a-8a).[1] Petitioners are a class composed of the purchasers of more than 9,000 Volvo "200 series" cars. For present purposes, there are two sets of

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[1] *Amicus* disagrees with Volvo's assertion (BIO 16 n.10) that Petitioners "quarrel with the First Circuit's assessment of the evidence." Volvo provides no citation or explanation for its assertion, and *amicus* could glean only one possible example from the brief in opposition. Volvo labels as "false" the Petition's statements that "*Respondents* were required by law to certify" FOB price information and that "*Respondents* . . . provided false FOB prices." BIO 9 (emphasis in BIO). Volvo complains that "it was *Trebol* that submitted FOB price information." *Id.* With respect, Volvo appears confused about the procedural posture of this case. The Trebol corporations are named as Respondents to the Petition, and Petitioners' statements accordingly are correct.

defendants. Respondent Volvo is the car manufacturer. The remaining Respondents (the "Trebol defendants") are Volvo's Puerto Rico distributor and dealer, and the owners of the Puerto Rican corporations. The principal allegation in the case is that, throughout a ten-year period, the Respondents consistently deceived Petitioners into purchasing Volvo cars at substantially inflated prices.

Because the First Circuit found that the Trebol defendants had violated RICO (*see* Pet. 16-18), this Court has before it only the claims against Volvo.[2] Petitioners' Third Amended Complaint ("Complaint") alleged a variety of fraudulent acts by Volvo. *E.g.*, Complaint ¶ 16(a) (alleging Volvo's involvement in manufacturing and exporting vehicles, parts, and emblems, as part of a scheme to defraud); *id.* ¶¶ 29, 88 (detailing communications by Volvo as part of scheme to defraud); *id.* ¶¶ 41, 45 (alleging "innumerable predicate acts"); *see also, e.g.*, Petrs' RICO Case Statement at 18-19 (detailing specific acts by Volvo). Petitioners therefore alleged in Count II of the Complaint that Volvo violated 18 U.S.C. § 1962(c), which makes it "unlawful for any person employed by or associated with any enterprise" in interstate commerce to engage in a "pattern of racketeering activity." Ct. App. A.3105 (¶¶ 123-42). Petitioners separately alleged in Count III of the Complaint that Volvo violated 18 U.S.C. § 1962(d), which makes it "unlawful for any person to conspire to violate any of the provisions of subsection . . . (c) of this section." *Id.* A.3110-12 (¶¶ 143-49).

Petitioners prevailed at trial under *both* 18 U.S.C. § 1962(c) and § 1962(d). "[T]he jury found that Volvo intentionally engaged in a pattern of racketeering activity through mail or wire fraud in violation of 18 U.S.C. § 1962(c) and conspired with Trebol to engage in the scheme to defraud, in violation of 18 U.S.C. § 1962(d) which caused injury to plaintiffs' business or property." Pet. App. 2a (opinion of the

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[2] The Trebol defendants have filed a separate Petition for Certiorari (No. 98-1092).

district court); *accord* BIO 3 ("The jury found that Volvo was liable for violating RICO § 1962(c) and conspiring to violate RICO under § 1962(d)."). The jury held Volvo liable for actual damages of approximately $43,000,000, which the district judge subsequently trebled pursuant to 18 U.S.C. § 1964(c). *Id.*

b. The evidence supporting the jury's findings against Volvo is set forth in the Petition (at 9-10) and also in the district court's detailed opinion rejecting Volvo's motions to overturn the verdict (Pet. App. 4a-8a). It goes without saying that substantial deference is owed to the verdict, as the jury had the opportunity to consider the credibility of witnesses and also the evidence taken as a whole.[3] As noted above, the court of appeals did not doubt that the evidence established the Trebol defendants' violation of RICO. But the court of appeals never addressed the conspiracy judgment against Volvo and therefore never addressed Petitioners' proof at trial of Volvo's exceedingly close relationship with the Trebol defendants, which permitted the inference that Volvo participated in the conspiracy. As recounted by the district court:

> The partnership between Volvo Car Corporation and Trebol extended beyond a mere contractual relationship. In addition to selling Trebol the Volvo vehicles, Volvo provided Trebol with assistance in advertising the vehicles, training the personnel, and financial assistance in certain instances. Representatives of Volvo visited Trebol's business facilities in Puerto Rico, several times a year, and representatives of Trebol traveled to Sweden or Spain for meetings with Volvo. In

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[3] Under the controlling First Circuit precedent, "a jury's verdict on the facts should only be overturned in the most compelling circumstances." *Wells Real Estate v. Greater Lowell Bd. of Realtors*, 850 F.2d 803, 811 (1st Cir.), *cert. denied*, 488 U.S. 955 (1988).

> between the personal meetings between representatives of the two entities, representatives of Volvo and Trebol communicated with each other continuously over the telephone and fax. During the relevant time period, sales of Volvo vehicles in Puerto Rico exceeded approximately $600 million. A Volvo representative testified that the success of Trebol was Volvo's best guarantee of its own prosperity.

Pet. App. 4a. In addition, the district court specifically confronted and rejected Volvo's argument that because the individual RICO predicate acts were committed only by the Trebol defendants, "Volvo should not be held liable for Trebol's activities":

> Based on the conflicting evidence, the jury determined that certain witnesses were more credible than others, and accorded more weight to certain testimony. Since the jurors are the ultimate triers of fact, the trial court shall be especially reluctant to order a new trial when the verdict rested upon the jury's determination of the credibility of witnesses. The jury's verdict determining that Volvo had engaged in a scheme to defraud using the mails and wires, and that plaintiffs were injured as a result of this scheme, is well supported by the evidence.

*Id.* 7a-8a (citation omitted).

## II. The Court Of Appeals Erred In Its Analysis Of Petitioners' RICO Conspiracy Claim.

Volvo successfully appealed the jury's verdict in its entirety. The First Circuit found that there was insufficient evidence to prove Volvo violated 18 U.S.C. § 1962(c), a holding that Petitioners do not contest here. Instead, Petitioners challenge the court of appeals' analysis (or lack thereof) of Volvo's liability for engaging in a RICO conspiracy. Petitioners contend – and *amicus* agrees – that the

decision below should be vacated because it fails to account for this Court's intervening decision in *Salinas v. United States* (522 U.S. 52 (1997)), which held that liability attaches under 18 U.S.C. § 1962(d) even as to defendants that do not commit or agree to commit two or more RICO predicate acts. But *amicus* believes that the court of appeals' error is even more substantial, in that the decision below fails *entirely* to account for the jury's verdict that Volvo engaged in a RICO conspiracy. The First Circuit appears to have failed to address Petitioners' RICO conspiracy claim and as a result erroneously has stripped the plaintiff class of the judgment in its favor. Accordingly, *amicus* understands that this Court should remand for further consideration to ensure that the First Circuit addresses Petitioners' RICO conspiracy claim in light of *Salinas*.

a. The First Circuit recognized in its factual statement that "the jury returned a verdict finding that Volvo was liable for violating *and conspiring to violate* RICO's prohibition on racketeering activity. 18 U.S.C. § 1962(c), (d)." Pet. App. 32a (emphasis added). But after this statement, the court of appeals never again mentioned or addressed in any respect the jury's finding that Volvo engaged in a RICO conspiracy. In fact, the analysis section of the decision below never mentions the word "conspiracy" and never cites to 18 U.S.C. § 1962(d). *See generally* Pet. App. 33a-54a. Nor did the court of appeals ever suggest, even obliquely, that its analysis of Volvo's liability under 18 U.S.C. § 1962(c) was controlling as to § 1962(d).

b. The conclusion that the First Circuit failed to account for Volvo's liability on a conspiracy theory is consistent with the statements in the opinion below, on which Volvo so heavily relies, to the effect that Volvo was not a "knowing participant" in the Trebol defendants' RICO predicate acts. The jury found Volvo liable under both 18 U.S.C. § 1962(c) and § 1962(d). To establish Volvo's liability under 18 U.S.C. *§ 1962(c)* (as distinct from the RICO conspiracy charge), Petitioners were required to prove that Volvo committed the relevant RICO predicate act: wire fraud. The First Circuit

held in *United States v. Cassiere* (4 F.3d 1006, 1111 (1st Cir. 1993)) that a wire fraud charge requires proof of the defendant's "knowing and willful participation in the scheme with the intent to defraud."

The First Circuit in this case addressed Volvo's "knowing participation" *not* in terms of the conspiracy, including by citing to any of its RICO conspiracy precedents. Instead, the First Circuit inquired whether Volvo "knowingly participated" in the wire fraud, citing the very same passage from its *Cassiere* decision. Pet. App. 34a. Moreover, the court of appeals' only statement regarding the quantum of proof required to establish Volvo's liability – that "a finding that Volvo committed predicate acts of mail or wire fraud [is] a crucial element of plaintiffs' RICO claim" (Pet. App. 33a-34a) – does not discuss Petitioners' RICO conspiracy claim. To the contrary, the accompanying footnote quotes only 18 U.S.C. § 1962(c) and the only citation in the text is to *Ahmed v. Rosenblatt* (118 F.3d 886, 888 (1st Cir. 1997), *cert. denied*, 118 S. Ct. 1165 (1998)), which did not involve or discuss a RICO conspiracy claim but (as in *Cassiere*) detailed the elements of wire fraud as a RICO predicate act under 18 U.S.C. § 1962(c).

The court of appeals held that Petitioners had not carried their burden of proving Volvo's "knowing participation" in wire fraud, finding insufficient evidence to establish that Volvo "participated in tax evasion involving FOB prices" (Pet. App. 37a), "knowingly participated in the [AUM] fraud" (*id.* 46a-47a), or "knew that Trebol was using false Law 77 labels" (*id.* 51a). Each of these statements thus addresses a class of RICO predicate act alleged by Petitioners, as distinct from the RICO conspiracy. It therefore cannot be overemphasized that the court of appeals addressed only Volvo's culpability under 18 U.S.C. § 1962(c), not its liability for engaging in a RICO conspiracy.

Notably, Respondent makes the contrary claim – that the First Circuit held Volvo did not knowingly participate in the conspiracy – *five different times* in the brief in opposition. But

for this vital point, on which Volvo's opposition to the Petition turns entirely, Respondent cannot cite or quote *any* reference to the opinion below. BIO 2 ("the First Circuit decided that there was no evidence that Volvo entered into *any* RICO conspiracy" (no citation)); *id.* 4 ("there must be proof that the defendant knowingly agreed to participate in the conspiracy. It was the application of that bedrock principle . . . that caused the First Circuit to reverse the judgment against Volvo on the conspiracy charge" (no citation)); *id.* 12 ("the judgment rests solely on the First Circuit's determination that Petitioners failed to prove that Volvo knowingly participated in any fraudulent scheme or other RICO conspiracy" (citing BIO 14-16 (in turn, providing no citation regarding knowledge of the conspiracy))); *id.* 13 ("since the First Circuit held that Volvo had not been involved in *any* conspiracy, the First Circuit had no occasion to consider which alleged conspirator had agreed to commit the RICO predicate acts" (no citation)); *id.* at 18-19 ("the First Circuit in this case . . . search[ed] the record, including all circumstantial evidence, for some proof that Volvo knew of, or knowingly joined in, any RICO conspiracy. The court made that search and could find no such proof" (no citation)).

c. Lacking support in the text of the opinion below, Respondent instead conflates the First Circuit's conclusion that Volvo did not "knowingly participate" in the predicate act of wire fraud with the distinct proposition that Volvo did not "knowingly participate" in the conspiracy to defraud. But the "knowledge" required under the two theories is unrelated, both (i) in its object and (ii) in the method by which it may be proved. First, *Salinas* holds that "it suffices that [a RICO conspirator] adopt the goal of furthering or facilitating the criminal endeavor." 118 S. Ct. at 477; *accord* Pet. 20. There is no logical or practical inconsistency between the jury's judgment that Volvo sought to *facilitate* the conspiracy's goal of defrauding Petitioners and the First Circuit's subsequent judgment that Volvo did not itself *participate* in individual acts of wire fraud. Because the opinion below never addresses the point, neither *amicus* nor this Court yet knows

whether the First Circuit believed that there was sufficient evidence in the record that Volvo "adopt[ed] the goal of furthering" the conspiracy.

Second, the quantum of proof required to establish Volvo's knowing participation in the *conspiracy* – as opposed to its knowing participation in individual predicate acts – is quite low and in the First Circuit may be established through circumstantial evidence. *Accord* Pet. 22. "[I]t is not necessary for the conspiratorial agreement to be express, so long as its existence can plausibly be inferred from words, actions, and the interdependence of activities and persons involved." *Aetna Cas. Sur. Co. v. P & B Autobody*, 43 F.3d 1546, 1562 (1st Cir. 1994). The district court detailed substantial evidence that supported the jury's verdict that Volvo knowingly participating in the conspiracy. *Supra* at 6-7 (quoting Pet. App. 4a, 6a-7a). But the opinion below nowhere suggests that the court of appeals considered the issue or the proof presented by Petitioners.

d. The court of appeals' failure to address Volvo's liability for engaging in a RICO conspiracy can be read in two ways, either of which calls for a remand in light of *Salinas v. United States*. First, the court of appeals may implicitly have concluded that a claim under § 1962(c) requires essentially the same quantum of proof as a RICO conspiracy claim under § 1962(d). On this reading, which would be consistent with the long-standing First Circuit precedent detailed in the Petition (at 11-15), the court of appeals found it unnecessary to discuss the jury's RICO conspiracy verdict. But this Court rejected precisely such a rule in *Salinas*, which held that "[t]he interplay between subsections (c) and (d) does not permit us to excuse from the reach of the *conspiracy* provision an actor who does not himself commit or agree to commit the two predicate acts requisite to the underlying offense." 118 S. Ct. 469, 478 (1997) (emphasis added).

Second, the court of appeals simply may have failed to account for the jury's RICO conspiracy verdict. As substantial as this error would be, it is the more plausible

reading.[4] As noted above, the decision below notes but then entirely fails to discuss Volvo's liability on a conspiracy theory. Nor does the decision below cite to *any* precedents involving RICO conspiracy claims.

*Amicus* understands that a remand in light of *Salinas* remains the correct judgment on this reading as well. *Salinas* held that a RICO conspiracy judgment will be sustained where the defendant "adopt[s] the goal of furthering or facilitating the criminal endeavor." 118 S. Ct. at 477. Because the court of appeals failed to undertake this inquiry, it should be given the opportunity to address Volvo's liability under the correct standard.

e. Finally, *amicus* notes that, unlike the ruling below, decisions from other federal courts have concluded that *Salinas*' holding controls on these facts. These courts hold that a plaintiff need prove only that a RICO conspiracy defendant "knew of and agreed to the overall objective of the RICO offense." *United States v. Posada-Rios*, 158 F.3d 832, 857 (5th Cir. 1998), *cert. denied*, 1999 U.S. LEXIS 2102 (Mar. 22, 1999); *see also, e.g.*, *Goren v. New Vision Int'l*, 156 F.3d 721, 731 (7th Cir. 1998) ("Although this court has yet to address the issue of the scope of § 1962(d) in the post-*Salinas* era, our prior interpretations of that provision comport with the Supreme Court's broad reading of that statute in *Salinas*."); *Kaplan v. Reed*, 28 F. Supp.2d 1191, 1197 (D. Colo. 1998) ("The 'intention to further the endeavor' was differentiated [in *Salinas*] from actual completion of the act of furthering the endeavor or even agreeing to commit the offense."); *Sadighi v. Daghighfekr*, C/A No. 2:98-2648-18, 1999 U.S. Dist. LEXIS 346, *8-9 (D.S.C. Jan. 15, 1999) ("Plaintiffs can establish a RICO conspiracy claim by

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[4] *Amicus* makes this point with all respect to the author of the court of appeals' opinion. But it is worth noting that only two judges participated in the decision below (*see* Pet. App. 29a n.*), depriving the First Circuit of the normal exchange between members of the panel.

demonstrating that the [] Defendants agreed to the overall objective of the conspiracy." (applying *Salinas*)); *Schmidt v. Fleet Bank*, 16 F. Supp.2d 340, 353 (S.D.N.Y. 1998) ("Under 18 U.S.C. § 1962(d), a party is liable for RICO conspiracy if it knew of the conspiracy's goals and agreed to facilitate them." (applying *Salinas*)); *cf. Fortney v. Kuipers*, No. 98 C 5387, 1999 U.S. Dist. LEXIS 2273 (N.D. Ill. Feb. 19, 1999); *Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc.*, 7 F. Supp.2d 277 (S.D.N.Y. 1998); *Pelfresne v. Village of Rosemont*, 22 F. Supp.2d 756, 764 (N.D. Ill. 1998).[5]

## CONCLUSION

The Petition for a Writ of Certiorari should be granted, the judgment vacated, and the case remanded for further consideration in light of *Salinas v. United States* (522 U.S. 52 (1997)).

Respectfully submitted,

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[5] Further, a circuit split may be developing over whether *Salinas* applies in civil RICO conspiracy cases. *Compare Goren v. New Vision Int'l, Inc.*, 156 F.3d 721, 731 (7th Cir. 1998) *with Beck v. Prupis*, 162 F.3d 1090, 1099 n.18 (11th Cir. 1998), *petition for cert. pending on separate question*, No. 98-1480. A remand to the First Circuit would facilitate the percolation of that question before it is presented to this Court.